Wee Choo Keong v Lee Chong Meng & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-149 OF 1995
SITI NORMA YAAKOB, ABU MANSOR AND ABDUL MALEK AHMAD JJCA
29 FEBRUARY 1996

Administrative Law *— Remedies — Certiorari — Appellant won seat in Parliamentary constituency — Appellant was fined RM7,000 by Supreme Court for contempt of evading service of injunction in civil suit before nomination day — Opposing contender filed election petition to challenge election — Election court disqualified appellant pursuant to art 48 of Federal Constitution — Declared opposing contender as Member of Parliament — Appellant applied for leave to apply for certiorari pursuant to O 53 of Rules of the High Court 1980 — Appellant applied to refer to Federal Court question of law, ie whether art 118 of Federal Constitution precluded certiorari against decision of election judge — Applications refused by trial judge — Whether trial judge had erred in law — Federal Constitution arts 48 & 118 — Rules of the High Court 1980 O 53*

Civil Procedure *— Application to refer question of law to Federal Court — General principle — Whether judge was correct in refusing to refer*

Civil Procedure *— Appeal — Election judge — Whether any right of appeal against decision of election judge — Election Offences Act 1954 s 36*

Administrative Law *— Exercise of judicial function — Judicial review — Whether judicial review lies against decisions of election judge*

The appellant and the first respondent were contenders of the Parliamentary seat for the Bukit Bintang constituency in the 1995 general elections. Before the nomination day, the appellant was fined RM7,000 by the (then) Supreme Court for contempt of evading service of injunction in a civil suit (see [1995] 3 MLJ 549). The appellant, however, was not rejected by the returning officer on nomination day, and he went on to win the seat in the Parliamentary constituency of Bukit Bintang on 25 April 1995. The first respondent, who was the losing candidate, filed an election petition to challenge the election pursuant to art 118 of the Federal Constitution ('the Constitution'). The first respondent argued that the appellant was disqualified for being a Member of Parliament as the contempt of evading service was a criminal offence, and pursuant to art 48(1)(e) of the Constitution, a person would be disqualified 'if he has been convicted of an offence by a court of law in the Federation'. The election judge, who agreed with the first respondent, went on to disqualify the appellant and to declare the first respondent as the properly-elected Member of Parliament for that constituency ('the election judge's decision'). As the appellant was barred by s 36 of the Election Offences Act 1954 from appealing against the election judge's decision, he filed an originating motion praying for leave to

apply for an order of certiorari to quash the decision ('the application for leave') under O 53 of the Rules of High Court 1980 ('the RHC'). The appellant contended that the election judge had erred in law in his interpretation of art 48(1)(e) of the Constitution and in declaring the first respondent as the duly elected Member of Parliament for the Bukit Bintang constituency. The appellant argued that the contempt of court which the appellant was found guilty of by the Federal Court was not a criminal offence as such, as it concerned evasion of service of an order of court arising from proceedings which were civil in nature, and moreover, no conviction had been recorded against the appellant. The appellant had also made an application to refer a question of law, ie 'whether the provisions of art 118 of the Constitution preclude certiorari from going to quash the decision of an election judge' to the Federal Court ('the application to refer the question of law'), pursuant to s 84 of the Courts of Judicature Act 1964 ('the CJA'). Counsel for the appellant contended that the answer should be in the negative, because the only remedy afforded by art 118 to challenge an election was through the procedure of filing an election petition, and if a citizen could go no further than an election petition, it would mean that an election judge would be empowered to elect a Member of Parliament. The trial judge, however, dismissed the appellant's application for leave as well as the application to refer the question of law. The appellant appealed.

Held, dismissing the appeal:

(1) (Per **Siti Norma Yaakob JCA**) Pursuant to s 84 of the CJA, the application to refer relates to the situation where in any proceedings before the High Court the judge may, in his discretion, refer a question relating to the effect of any provision of the Constitution to the Federal Court by way of a special case. Before deciding so, the judge must be satisfied that the constitutional question sought to be referred must have a direct bearing to the matter of dispute before him, and that the decision of the Federal Court must have the effect of bringing the determination of the dispute before him to a speedy and economical end (see p 52D–F)

(2) (Per **Siti Norma Yaakob JCA**) There is nothing ambiguous about art 118 of the Constitution. It merely creates the machinery for challenging an election, and the place where the challenge can be pronounced. The court could not see how the substantive application for leave had any bearing to the provisions of art 118. Whilst the former concerned the issue as to whether the decision of the election judge was amenable to certiorari, the latter dealt with a totally different matter altogether, and therefore requires no prior determination of its provisions. Moreover, the law as to the granting or refusal of leave under O 53 of the RHC was well

A settled and posed no difficulty and it was within the competence of the trial judge to make a finding whether such leave ought to be granted or not (see p 53G–H).

(3) (Per **Siti Norma Yaakob JCA**) Article 118 of the Constitution contained no expressed ouster clause. What the appellant wanted B the Federal Court to answer was that there was an implied ouster clause in art 118, which was not the case here. This court was loath to disturb the finding of the trial judge as he had exercised his discretion correctly when he declined to refer art 118 to the Federal Court (see p 54G–H).

C (4) (Per **Siti Norma Yaakob JCA**) Judicial review does not lie against the magistrates' courts, the sessions courts, the High Courts or the Court of Appeal, but only against decisions of inferior courts (eg, the Industrial Court) or tribunals (eg, the Special Commissioners of Income Tax). This is so as the alternative remedy of appeals is available to the other or superior D courts (see p 55B).

(5) (Per **Siti Norma Yaakob JCA**) **When** an election judge hears an election petition, he sits in the High Court. The order of certiorari does not lie to quash the decision of the election judge as his court is not an inferior court, but is very much part of the E High Court exercising a special jurisdiction. Thus, the trial judge was correct when he dismissed the appellant's application for leave under O 53 r 1(1) (see p 55C–D); *Ignatius Stephen Malanjun v Election Judge Sabah & Anor* (Supreme Court Appeal No 03–42–89) (unreported)(SC) followed.

F (6) (Per **Abdul Malek Ahmad JCA**) The law is well-settled that there shall be no appeal from the decision of an election judge. Section 36 of the Election Offences Act 1954 states that the election judge shall determine at the conclusion of the trial of an election petition whether the candidate whose return or election is complained of, or any other and what person, was duly returned G or elected, or whether the election was void, and shall certify such determination to the election commission or to the state authority, as the case may be, and upon such certificate being given such determination shall be final (see pp 56I and 57A–C); *Re Perting Timor Election (No 2)* [1962] MLJ 333 (CA); *Tunku* H *Abdullah v Ali Amberan* [1971] 1 MLJ 25 (FC) and *Dasun Gaban v Zulkifle bin Majun & Ors* [1982] 1 MLJ 315 (FC) followed.

(7) (Per **Abdul Malek Ahmad JCA**) An election can only be called in question by an election petition which in this instance had taken place. So whatever the decision of the election judge, including his finding on the interpretation of art 48(1)(e) of the I Constitution, rightly or wrongly, that decision stands (see p 61A–B).

(8) (Per **Abu Mansor JCA**) It is not for the court to question the wisdom of Parliament. The task of hearing any election petition has been given by Parliament to a Court of Chief Justice and anyone nominated by him. Parliament has, by s 36 of the Election Offences Act 1954, laid out that the judge's decision is final. With the above considerations, the answer the judge would have arrived at was a refusal to refer, and that was correct (see p 62C).

(9) (Per **Abu Mansor JCA**) There is no judicial review of the decision of an election judge who, for all intents and purposes, has coordinate jurisdiction with — and not inferior jurisdiction to — a High Court judge (see p 62D–F); *Ignatius Stephen Malanjum v Election Judge, Sabah & Anor* [1989] 2 MLJ 433 followed.

[Bahasa Malaysia summary

Perayu dan penentang pertama merupakan petanding untuk kerusi Parlimen bagi bahagian pilihanraya Bukit Bintang dalam pilihanraya umum tahun 1995. Sebelum hari pencalonan, perayu telah didenda RM7,000 oleh Mahkamah Agung (pada masa itu) untuk penghinaan mahkamah akibat pengelakan penyampaian injunksi dalam suatu guaman sivil (lihat [1995] 3 MLJ 549). Namun demikian, perayu tidak ditolak oleh pegawai pilihanraya pada hari pencalonan, dan beliau terus memenangi kerusi Parlimen bagi bahagian pilihanraya Bukit Bintang pada 25 April 1995. Penentang pertama, yang merupakan calon yang kalah, memfailkan satu petisyen pilihanraya untuk mencabar pilihanraya tersebut menurut perkara 118 Perlembagaan Persekutuan ('Perlembagaan'). Penentang pertama berhujah bahawa perayu tidak layak sebagai seorang ahli Parlimen sebab penghinaan mahkamah akibat pengelakan penyampaian adalah suatu kesalahan jenayah, dan menurut perkara 48(1)(e) Perlembagaan, seseorang tidak layak 'jika ia telah disabitkan suatu kesalahan oleh sesuatu mahkamah di Persekutuan'. Hakim pilihanraya bersetuju dengan penentang pertama, dan terus menyingkir perayu, dan mengisytiharkan penentang pertama sebagai ahli Parlimen yang telah dilantik secara betul untuk bahagian pilihanraya tersebut ('keputusan hakim pilihanraya'). Oleh kerana perayu dilarang daripada membuat rayuan terhadap keputusan hakim pilihanraya menerusi s 36 Akta Kesalahan Pilihanraya 1954, beliau telah memfail usul pemula meminta kebenaran untuk memohon perintah certiorari bagi membatalkan keputusan itu ('permohonan untuk kebenaran') di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Perayu berhujah bahawa hakim pilihanraya telah melakukan kesilapan undang-undang dalam tafsirannya atas perkara 48(1)(e) Perlembagaan dan dalam perisytiharan penentang pertama sebagai ahli Parlimen yang dilantik untuk bahagian pilihanraya Bukit Bintang. Perayu membantah bahawa penghinaan mahkamah atas mana beliau didapati bersalah oleh Mahkamah Persekutuan bukanlah kesalahan jenayah

A sebab ia berhubung dengan pengelakan penyampaian perintah mahkamah yang timbul daripada prosiding yang bersifat sivil, dan tambahan pula, tiada sabitan telah direkodkan terhadap perayu. Perayu juga telah membuat suatu permohonan untuk merujuk persoalan undang-undang, iaitu 'sama ada atau tidak peruntukan perkara 118 Perlembagaan mengecualikan certiorari daripada membatalkan keputusan seorang hakim pilihanraya' kepada Mahkamah Persekutuan ('permohonan untuk merujuk persoalan undang-undang'), menurut s 84 Akta Mahkamah Kehakiman 1964 ('AMK'). Peguam bagi perayu berhujah bahawa jawapan harus adalah negatif, sebab remedi tunggal yang diberikan oleh perkara 118 bagi mencabar sesebuah pilihanraya adalah melalui prosedur memfailkan petisyen pilihanraya, dan jika seseorang rakyat tidak dapat membuat cabaran yang lebih lanjut daripada itu, ia bermakna bahawa hakim pilihanraya akan mempunyai kuasa untuk melantik ahli Parlimen. Walau bagaimanapun, hakim perbicaraan telah menolak permohonan perayu untuk kebenaran dan juga permohonan untuk merujuk persoalan undang-undang. Perayu membuat rayuan.

Diputuskan, menolak rayuan:

(1) (Oleh **Siti Norma Yaakob HMR**) Menurut s 84 AMK, permohonan untuk merujuk berhubung dengan keadaan di mana dalam apa-apa prosiding di Mahkamah Tinggi hakim boleh, atas budi bicaranya, merujuk persoalan yang berkaitan dengan kesan mana-mana peruntukan Perlembagaan kepada Mahkamah Persekutuan melalui suatu kes khas. Sebelum membuat keputusan demikian, hakim mestilah berpuas hati bahawa persoalan perlembagaan yang dirujuk mempunyai pertalian langsung dengan perkara yang dipertikaikan di hadapannya, dan bahawa keputusan Mahkamah Persekutuan mestilah mengakibatkan penyelesaian pertikaian di hadapannya secara cepat dan ekonomik (lihat ms 52D–F).

(2) (Oleh **Siti Norma Yaakob HMR**) Tiada apa yang taksa mengenai perkara 118 Perlembagaan. Ia hanya mencipta mekanisme bagi mencabar pilihanraya, dan tempat di mana cabaran boleh diumumkan. Mahkamah tidak nampak bagaimana permohonan substantif untuk kebenaran mempunyai apa-apa pertalian dengan peruntukan perkara 118. Sedangkan yang pertama berhubung dengan isu sama ada atau tidak keputusan hakim pilihanraya boleh dibatalkan oleh certiorari, yang kedua membincangkan perkara yang berbeza sama sekali, dan dengan itu tidak memerlukan penentuan terlebih dahulu atas peruntukannya. Tambahan pula, undang-undang yang berkaitan dengan pemberian atau penolakan kebenaran di bawah A 53 KMT adalah mantap dan tidak menimbulkan apa-apa kesulitan dan ia adalah dalam kompetens hakim perbicaraan untuk membuat keputusan sama ada atau tidak kebenaran sedemikian harus diberikan (lihat ms 53G–H).

(3) (Oleh **Siti Norma Yaakob HMR**) Perkara 118 Perlembagaan tidak mengandungi sebarang fasal penyingkiran yang dinyatakan. Apa yang perayu menghendaki Mahkamah Persekutuan menjawab adalah bahawa terdapat suatu fasal penyingkiran yang tersirat dalam perkara 118, yang tidak merupakan kes di sini. Mahkamah ini keberatan mengganggu keputusan hakim perbicaraan sebab beliau telah melaksanakan budi bicaranya dengan betul apabila beliau enggan merujuk perkara 118 kepada Mahkamah Persekutuan (lihat ms 54G–H).

(4) (Oleh **Siti Norma Yaakob HMR**) Kajian semula kehakiman tidak terletak terhadap mahkamah majistret, mahkamah sesyen, Mahkamah Tinggi atau Mahkamah Rayuan, tetapi hanya terhadap keputusan mahkamah bawahan (misalnya, Mahkamah Perusahaan) atau tribunal (misalnya, Pesuruhjaya Khas Cukai Pendapatan). Ini adalah supaya remedi rayuan alternatif terbuka kepada mahkamah lain atau mahkamah atasan (lihat ms 55B).

(5) (Oleh **Siti Norma Yaakob HMR**) Apabila seseorang hakim pilihanraya membicarakan suatu petisyen pilihanraya, beliau duduk di Mahkamah Tinggi. Perintah certiorari tidak boleh membatalkan keputusan hakim pilihanraya sebab mahkamah beliau bukanlah mahkamah bawahan, tetapi adalah pada hakikatnya sebahagian daripada Mahkamah Tinggi yang melaksanakan bidang kuasa khas. Justeru itu, hakim perbicaraan adalah betul apabila beliau menolak permohonan perayu untuk kebenaran di bawah A 53 k 1(1) (lihat ms 55C–D); *Ignatius Stephen Malanjun v Election Judge Sabah & Anor* (Rayuan Mahkamah Agung No 03–42–89) (tidak dilaporkan) (MA) diikut.

(6) (Oleh **Abdul Malek Ahmad HMR**) Adalah merupakan undang-undang mantap bahawa tidak terdapat rayuan daripada keputusan seseorang hakim pilihanraya. Seksyen 36 Akta Kesalahan Pilihanraya 1954 menyatakan bahawa hakim pilihanraya harus membuat keputusan di penghujung perbicaraan sesuatu petisyen pilihanraya sama ada atau tidak calon yang pemilihannya atau pengembaliannya diadu, atau orang lain dan siapa, yang telah dipilih atau dikembalikan, atau sama ada atau tidak pilihanraya itu adalah terbatal, dan harus mengesahkan penentuan sedemikian kepada jawatankuasa pilihanraya atau kepada pihak berkuasa negeri, mengikut keadaan, dan atas pemberian sijil itu penentuan sedemikian adalah muktamad (lihat ms 56I dan 57A–C); *Re Perting Timor Election (No 2)* [1962] MLJ 333 (MR); *Tunku Abdullah v Ali Amberan* [1971] 1 MLJ 25 (MP) dan *Dasun Gaban v Zulkifle bin Majun & Ors* [1982] 1 MLJ 315 (MP) diikut.

(7) (Oleh **Abdul Malek Ahmad HMR**) Sesebuah pilihanraya hanya boleh dipersoalkan melalui suatu petisyen pilihanraya, yang telah pun berlaku di sini. Jadi, apa saja keputusan hakim pilihanraya, termasuk pendapat beliau atas tafsiran perkara 118 Perlembagaan, sama ada betul atau salah, keputusan tersebut adalah kekal (lihat ms 61A–B).

(8) (Oleh **Abu Mansor HMR**) Adalah bukan tugas mahkamah untuk mempersoalkan kebijaksanaan Parlimen. Tugas membicarakan sebarang petisyen pilihanraya telah diberikan oleh Parlimen kepada sebuah Mahkamah Ketua Hakim dan sesiapa yang dilantiknya. Melalui s 36 Akta Kesalahan Pilihanraya 1954, Parlimen telah menetapkan bahawa keputusan hakim adalah muktamad. Dengan pertimbangan di atas, jawapan yang akan dicapai oleh hakim adalah penolakan untuk merujuk, dan ianya adalah betul (lihat ms 62C).

(9) (Oleh **Abu Mansor HMR**) Kajian semula kehakiman terhadap keputusan seseorang hakim pilihanraya yang, untuk kesemua tujuan, mempunyai bidang kuasa yang setara dan bukan bidang kuasa yang inferior kepada seseorang hakim Mahkamah Tinggi, tidak wujud (lihat ms 62D–F); *Ignatius Stephen Malanjum v Election Judge, Sabah & Anor* [1989] 2 MLJ 433 diikut.]

Notes

For cases on exercise of judicial functions, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 51–70.

For cases on remedies, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 96–403.

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Cases referred to

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228

Dason Gaban v Zulkifle bin Majun & Ors [1982] 1 MLJ 315

Devan Nair v Yong Kuan Teik [1967] 1 MLJ 261

Goonesinha v Hon CL De Kretser (1944) JC 62

Ignatius Stephen Malanjum v Election Judge, Sabah & Anor [1989] 2 MLJ 433

Ignatius Stephen Malanjum v Election Judge, Sabah & Anor (Supreme Court Appeal No 03–42–89) (unreported)

Mak Sik Kwong v Minister of Home Affairs, Malaysia [1975] 2 MLJ 168

Perting Timor Election (No 2), Re [1962] MLJ 333

R v Cripps ex parte Muldoon & Ors [1984] 1 QB 68

Racal Communications Ltd, Re [1981] AC 374

Sabdin Ghani v Mohamed Saidi Lampoh & 25 Other Election Petitions [1983] 2 MLJ 61

South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Ors [1981] AC 363

Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317

Tunku Abdullah v Ali Amberan [1971] 1 MLJ 25

Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1995] 3 MLJ 549

Zulkarnaini bin Mohamed Noor v Syed Omar bin Mohamed & Anor [1979] 2 MLJ 143

Legislation referred to

Courts of Judicature Act 1964 s 84
Election Offences Act 1954 ss 33, 33(1), 34, 35, 36, 42
Federal Constitution arts 48(1)(e), 118, 182(6)
Rules of the High Court 1980 O 20 r 11, O 53 r 1(3)

Appeal from: Originating Motion No R1–25–127–1995 (High Court, Kuala Lumpur)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Stanley Isaacs (Senior Federal Counsel) (*Haliza Aini bte Dato' Othman*, Senior Federal Counsel, with him) for the respondents.

Cur Adv Vult

29 February 1996

Siti Norma Yaakob JCA: To appreciate the nature of this appeal before us, it is necessary that we begin with some factual background.

At the general elections held on 25 April 1995, three contenders vied for the Parliamentary seat for the Bukit Bintang constituency. The three were Mr Wee Choo Keong, the appellant before us; Mr Lee Chong Meng, the first respondent; and Mr Teng Chang Khim, who is not a party in this appeal.

The appellant was duly elected the Member of Parliament for Bukit Bintang but his election was challenged by firstly, the first respondent, who filed an election petition, PP–1–95, on 19 June 1995; and secondly, by Mr Wong Yook Sung @ Wong Tong Lim — the second respondent and a voter at the same constituency — who filed a separate election petition, PP–3–95, on 2 August 1995. Both election petitions were filed pursuant to the provisions of art 118 of the Federal Constitution and both cited the election commission, the returning officer for the Bukit Bintang constituency and the appellant as respondents. The challenge in both petitions is grounded on the fact that the appellant had been convicted of the offence of contempt of court and fined RM7,000 and hence disqualified to be a Member of Parliament under the provisions of art 48 (1)(e) of the Federal Constitution.

It is common ground that in proceedings brought by MBf Holdings Bhd and another against the appellant and two others, Anuar J (as he then was) had granted an injunction against the appellant on 9 February 1993 restraining him from printing, circulating, distributing or publishing any allegation of impropriety or irregularity or illegality against MBf Holdings and its subsidiaries.

A In subsequent committal proceedings commenced against the appellant, the learned judge found on 31 December 1993 that the appellant had breached the injunction and had also evaded service of the said injunction. On 28 January 1994, the appellant was sentenced to two years' imprisonment for the breach and another two years for the evasion of service charge.

B On appeal, the Supreme Court on 14 April 1995 by a unanimous decision set aside Anuar J's finding on the breach and sentence and by a majority of 2:1 confirmed his finding on the evasion of service of the injunction, set aside the sentence of two years' imprisonment and substituted it with a fine of RM7,000. It was on the basis of this contempt that the C election of the appellant was challenged.

Ahmad Fairuz J (as he then was) was nominated by the Chief Judge of Malaya under the provisions of s 33(1) of the Election Offences Act 1954 ('the Act') to try the two election petitions. On 2 August 1995, the learned High Court judge made the following findings:

D (1) that the contempt of evading service of the injunction by the appellant is a criminal offence; and

(2) under such circumstances, the returning officer ought not to have accepted the appellant's nomination papers on 15 April 1995 (nomination day) as at that point of time, the appellant was already convicted of a criminal offence and sentenced to a fine of RM7,000 and E therefore disqualified under the provisions of art 48(1)(e) of the Federal Constitution and to that end, he was not duly elected or properly returned.

Consequent upon these findings, the learned election judge made two declarations:

F (1) that the appellant had not been properly and legally elected; and

(2) that the first respondent is the duly elected Member of Parliament for Bukit Bintang.

As the appellant is barred by s 36 of the Act from appealing against the decision of the election judge, he instead filed Originating Motion R1–25–G 127–95 in the Appellate and Special Powers Division of the High Court at Kuala Lumpur, citing the election judge (this was later struck out), the first and second respondents as respondents and praying for leave ex parte to apply for an order of certiorari to quash the decision of the election judge made on 2 August 1995. In his statement in support, he contends H that the election judge had erred in law in his interpretation of art 48(1)(e) of the Federal Constitution and in declaring the first respondent as the duly elected Member of Parliament for the Bukit Bintang constituency.

Although the substantive application in the originating motion was for leave under O 53 of the Rules of High Court 1980, Mohd Nor J, who I heard the motion, had at the outset of the hearing before him to contend with an application by the appellant to refer a question of law to the Federal Court relating to the effect of art 118 of the Federal Constitution.

Notice of intention to refer had been given by the appellant to the respondents and the court. On 28 September 1995, the learned trial judge dismissed both the applications to refer as well as the application for leave with costs, and it is against this order that the appeal before us is founded. A

The appellant lists five grounds in his memorandum of appeal, but before us arguments were confined to only three, namely: B

(1) the failure of the learned trial judge to refer to the Federal Court a question of law of public importance relating to the effect of art 118 of the Federal Constitution;

(2) the failure of the learned trial judge to conclude that the decision of the election judge was amenable to certiorari; and C

(3) the failure of the learned trial judge to grant leave to issue an order of certiorari to quash the decision of the election judge, having regard to the law, facts and the circumstances of the case.

From the record of proceedings in the court below, arguments were centred principally on the application to refer. Before us, Mr Karpal Singh of counsel for the appellant, was quick to respond that he was not abandoning his substantive application for leave altogether and with that confirmation, arguments proceeded before us on the basis of the application to refer as well as on the application for leave. D E

The application to refer the question of law was made pursuant to the provisions of s 84 of the Courts of Judicature Act 1964 ('the CJA'), which states as follows:

> 84 Reference of constitutional question by High Court
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> (1) Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court. F
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> (2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings. G
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> (3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative. H
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> (4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court. I

A The question of law sought to be referred has been framed by the appellant as follows: whether the provisions of art 118 of the Federal Constitution preclude certiorari from going to quash the decision of an election judge.

Article 118 of the Federal Constitution is expressed in the following terms:

B 118 Method of challenging election

No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

C As a matter of completeness, I also reproduce the provisions of art 48(1)(e) of the Federal Constitution as that article featured prominently in the decision of the election judge.

48 Disqualification for membership of Parliament

(1) Subject to the provisions of this Article, a person is disqualified from
D being a member of either House of Parliament if —

(a) .....

(b) .....

(c) .....

(d) ....

E (e) he has been convicted of an offence by a court of law in the Federation (or, before Malaysia Day, in the territories comprised in the State of Sabah or Sarawak or in Singapore) and sentenced to imprisonment for a term of not less than one year or to a fine of not less than two thousand ringgit and has not received a free pardon; or ...

F It is Mr Karpal Singh's submission that the only remedy afforded by art 118 by which an aggrieved party can challenge a Federal or State election is through the procedure of filing an election petition in the High Court where the election took place. To that end, he contends that art 118 is a finality clause and like any other ouster clause present in any other statute, it does not stultify the High Court from reviewing the decision of a
G tribunal which contains an error of law. For this, he relies on the case of *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317. In that instance, that tribunal is the court of the election judge that declared the election of the appellant to be improper.

Mr Karpal Singh also identifies the error committed by the election
H judge to be his declaration that the first respondent was duly elected after finding the appellant to be disqualified under art 48(1)(e). He views the effect of such declaration to be that whilst the appellant was elected by the people, the first respondent was however elected by the court, a situation that is never envisaged in a true democracy. He further contends that the contempt of court which the appellant was found guilty of by the Federal
I Court is not a criminal offence as such as it relates to evasion of service of an order of court arising from proceedings which are civil in nature.

Moreover, art 48(1)(e) disqualifies a person from being a Member of Parliament if he is 'convicted of an offence' and these words must mean that such conviction must be recorded. It is an undisputed fact that no conviction has been recorded against the appellant. A

It is to correct all these errors that the appellant now wants the provisions of art 118 to be interpreted and defined by the Federal Court, particularly whether the article provides only one remedy for challenging a Parliamentary or State election or whether it allows for other remedies like the right of a judicial review through the issue of certiorari. B

If the Federal Court decides that the article envisages other remedies besides the filing of an election petition, then the matter can be reverted back to the learned High Court judge who would then consider whether leave can be granted. C

We will first consider the effect of s 84 of the CJA, under which the application to refer was made. It relates to the situation where in any proceedings before the High Court the judge may, in his discretion, refer a question relating to the effect of any provision of the Constitution to the Federal Court by way of a special case. Before deciding so, the judge must be satisfied that the constitutional question sought to be referred must have a direct bearing to the matter of dispute before him, and that the decision of the Federal Court must have the effect of bringing the determination of the dispute before him to a speedy and economical end. In some way, the dispute must be related to the constitutional question sought to be referred and that there must be a difficult issue or issues posed by the dispute that are irreconcilable with a constitutional provision and it is only in this situation that reference of a constitutional question becomes necessary. D E F

Mohd Nor J declined to refer to the Federal Court the question of whether the provisions of art 118 preclude certiorari from going to quash the decision of Ahmad Fairuz J (as he then was). The issue then is whether the learned trial judge had exercised his discretion rightly or wrongly.

Before dealing with that issue, there is one aspect of the learned judge's judgment that we find irreconcilable. At para 4 of his judgment, he had expressed his opinion that the application to refer should have been made before the election judge when the provisions of art 48(1)(e) of the Federal Constitution was in issue before him as the election judge was equally seised of the jurisdiction to refer as his court was very much part and parcel of the High Court. If that is what it is intended to mean, does it follow that the learned trial judge is of the opinion that he was not seised with the jurisdiction to refer under s 84, when clearly he had alluded to it at great length in the earlier part of his judgment? G H

To put that doubt at rest, we need to point out that s 84 speaks of 'any proceedings in the High Court', and by that very broad definition, the learned judge was indeed seised of the jurisdiction to refer under s 84, but the fact that the application to refer had not been made earlier before the I

A election judge makes no difference to his jurisdiction nor does it prejudice the appellant in any way, for it may well be that the appellant had taken a tactical approach by not applying for it earlier before the election judge.

Returning to the issue at hand, it must be remembered that the substantive application in the proceedings before the learned High Court B judge was whether leave ought to or ought not to be granted under O 53 of the Rules of the High Court 1980. The merits of whether certiorari should or should not be issued had yet to be argued at that stage.

Casting our attention to art 118, all that particular article seeks to define is that a Parliamentary of State election can only be questioned C through an election petition, and that such petition be presented to the High Court having jurisdiction where the election took place. It is silent as to the finality of the proceedings in the election petition nor any mention made as to whether there is any right to a judicial review of the determination of the election petition. Neither can it be read to mean that it includes an ouster clause as well. To maintain so would amount to putting words and D meanings into art 118 that are not present and rewriting the whole article.

The finality of an election petition is clearly spelt out by s 36 of the Act which, after all, is the principal Act governing all matters relating to election petitions. The fact that Parliament chose not to make provisions about the finality of an election petition in the Federal Constitution — as E it did in respect of proceedings in the Special Court as can be seen from art 182(6) — does not, ipso facto, amount to our interpreting art 118 as impliedly containing provisions as to finality. If indeed Parliament intended art 118 to be a finality clause, it could easily have made provisions similar to art 182(6). Since it did not, we do not consider it proper to question why the finality of an election petition is expressed in the statute governing F election petitions and not in the Federal Constitution itself. Suffice it is for us to say that Parliament in its wisdom saw it fit to have the finality clause expressed in the Act which was specially enacted and not in the supreme law of the land.

There is nothing ambiguous or uncertain about art 118. It merely G creates the machinery for challenging an election, and the place where the challenge can be pronounced. It goes no further than just that. It is for this reason that we cannot see how the substantive application for leave has any bearing to the provisions of art 118. Whilst the former concerns the issue as to whether the decision of the election judge is amenable to certiorari, the latter deals with a totally different matter altogether, and therefore H requires no prior determination of its provisions. Moreover, the law as to the granting or refusal of leave under O 53 of the Rules is well settled and poses no difficulty and it is within the competence of the learned trial judge to make a finding whether such leave ought to be granted or not.

When it comes to the substantive part of how an election petition is I to be dealt with, Pt VII of the Act makes all the necessary provisions like the appointment and powers of the election judge at s 33; the persons who may present the petition at s 34; the relief that may be claimed at s 35; the

finality of the petition at s 36 and the procedure and practice applicable at s 42, to cite a few of such provisions. A

Quite apart from the differing subject matters dealt with by art 118 and Pt VII of the Act, we cannot reconcile that the constitutional question sought to be referred can have the effect of bringing 'the speedy and economical final determination of the proceedings' before the learned trial judge. Mr Karpal Singh quite unconciously admitted this to be so when he pleaded that all that the appellant wants is to have the constitutional question referred to the Federal Court, and should the Federal Court decide that certiorari lie to quash a decision of an election judge, the matter for leave be reverted to the High Court so that it can be argued at length before the learned judge. This may well explain the reason why no arguments to support the application for leave were advanced in the court below. B C

Since the appellant is relying on *Sykt Kenderaan*'s case, we need to say a few words about it. That case was decided by this court before another panel made up of Gopal Sri Ram, NH Chan and VC George JJCA. What was required to be decided in that case was whether the provisions of sub-s (1) of s 33B of the Industrial Relations Act 1967 — which is an ouster clause — disable the High Court from exercising its judicial review over awards of the Industrial Court. It was held that they did not for so long as the Industrial Court, an inferior tribunal, makes an error of law regardless of whether such error goes to jurisdiction. In so deciding, the court has not followed the controversial decision of the Privy Council in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union & Ors* [1981] AC 363, which drew a distinction between an error of law affecting jurisdiction and one which did not. The court declared that *Fire Bricks* is no longer good law. Since this case illustrates the futility of an ouster clause to oust the supervisory jurisdiction of the High Court to review the decision of an inferior tribunal which contains an error of law, Mr Karpal Singh wants us to have art 118 referred to the Federal Court so that the error or errors made by the election judge can be reviewed by way of certiorari. D E F G

We do not consider that the decision of *Sykt Kenderaan* can be of much assistance to us as the court in that case was interpreting the effect of an ouster clause that is expressed in a particular statute. Article 118 contains no expressed ouster clause. What the appellant wants the Federal Court to answer is that there is such an implied ouster clause in art 118, which we say is not the case. H

For the reasons that we have given, we are loath to disturb the finding of the learned judge as he had exercised his discretion correctly when he declined to refer art 118 to the Federal Court.

Coming now to the question of leave, this must first be obtained under O 53 r 1(1), before an application for certiorari can be made. The requirement of obtaining such leave which normally is applied for ex parte I

A is to eliminate at an early stage any application for judicial review which is frivolous, vexatious or hopeless.

A pertinent question to be asked at the leave hearing is against whom does judicial review lie. As far as courts are concerned, judicial review does not lie against the magistrates' courts, the sessions courts, the High Courts B or the Court of Appeal, but only against decisions of inferior courts (eg, the Industrial Court) or tribunals (eg, the Special Commissioners of Income Tax). This is so as the alternative remedy of appeals is available to the other or superior courts.

We next ask ourselves whether the court of the election judge whose C decision is being impugned is an inferior court.

That same issue has already been decided in the case of *Ignatius Stephen Malanjun v Election Judge Sabah & Anor* (unreported) where in its oral judgment, the (then) Supreme Court held that when an election judge hears an election petition, he sits in the High Court. He constitutes a special tribunal where the necessary incident of appeal does not apply. As D such, the court where the election judge sits is not an inferior court against which an order of certiorari can be issued.

Mr Karpal Singh has urged us not to take cognizance of this case as the structure of the courts in this country then was very much different from what it is today. With the establishment of the Court of Appeal on 24 E June 1994, there is now a three-tier appellate jurisdiction exercised by the High Court, the Court of Appeal and the Federal Court — quite unlike the pre-24 June 1994 situation when only the High Court and the Supreme Court exercised appellate jurisdiction. For this reason, he considers that the Supreme Court then can never be equated to the Federal Court now, F the highest tribunal and the final court of appeal in the country.

With respect, we cannot accept his submission as the Federal Court is very much the successor of the Supreme Court. It assumed a different name with the establishment of the Court of Appeal; and apart from that difference, the Supreme Court was the final court of appeal in the country G before 24 June 1994. As such, it ranks on the same status as the present Federal Court, and it can never be equated to anything lesser. If the Court of Appeal had been in existence, then it would still have been the intermediate court between the High Court and the Supreme Court — a situation that is no more different than what it is today, the only exception being that the highest tribunal has assumed a new name.

H

Being members of the court that is subordinate to the highest tribunal in the country, we are bound by the principle of *stare decisis* to accept the decision of *Malanjun*'s case as binding upon us. Thus, the order of certiorari does not lie to quash the decision of the election judge as his court is not an inferior court, but is very much part of the High Court exercising a I special jurisdiction. To that end, the learned trial judge was correct when he dismissed the appellant's application for leave under O 53 r 1(1).

For the reasons that we have given, we dismiss this appeal with costs, we confirm the decision of the High Court and the deposit made by the appellant be paid to the respondents to account of their taxed costs.

Abdul Malek Ahmad JCA: Article 48(1)(e) of the Federal Constitution states that a person is disqualified for being a member of either House of Parliament if he has been convicted of an offence by a court of law in the Federation and sentenced to imprisonment for a term of not less than one year or to a fine of not less than RM2,000 and has not received a free pardon. The day before nomination day, namely on 14 April 1995, the appellant had been fined RM7,000 by the Federal Court by a majority of one.

Despite that, he was not rejected by the returning officer on nomination day and went on to win the seat in the Parliamentary constituency of Bukit Bintang on 25 April 1995. This, of course, incurred the wrath of the first respondent, who was one of the two losing candidates who had accordingly filed the election petition in question and on 2 August 1995, the election judge had found in his favour.

Naturally upset by this turn of events, the appellant had on 14 August 1995 filed an originating motion against the election judge and the respondents to apply for leave for an order of certiorari to quash the decision of the election judge made on 2 August 1995 whereby the appellant was disqualified as the Member of Parliament for the Parliamentary constituency of Bukit Bintang and the first respondent was duly declared as the properly-elected Member of Parliament for that constituency. The application against the election judge was subsequently withdrawn.

The grounds in support of that originating motion as found in the accompanying statement were that the decision of the election judge dated 2 August 1995 reflected an error on the face of the record and is in excess of jurisdiction for the following reasons:

(a) the election judge erred in law in his interpretation of the provisions of art 48(1)(e) of the Federal Constitution having regard to the facts and circumstances;

(b) the election judge was wrong in law in declaring the first respondent as the properly-elected Member of Parliament for the Parliamentary constituency of Bukit Bintang; and

(c) the election judge's decision dated 2 August 1995 was fatally flawed in law as the first election petition was a nullity.

The law is well-settled that there shall be no appeal from the decision of an election judge. Section 36 of the Election Offences Act 1954 states that the election judge shall determine at the conclusion of the trial of an election petition whether the candidate whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the

A election was void, and shall certify such determination to the election commission or to the state authority, as the case may be, and upon such certificate being given such determination shall be final.

This legislative provision had been given judicial sanction as long ago as in 1962 by the Court of Appeal in *Re Perting Timor Election (No 2)* B [1962] MLJ 333 and in 1970 when the Federal Court decided in *Tunku Abdullah v Ali Amberan* [1971] 1 MLJ 25 that the final order of an election judge is unappealable and therefore, the Federal Court had no jurisdiction to entertain the appeal. The same situation arose again in 1982 when the Federal Court held in *Dasun Gaban v Zulkifle bin Majun & Ors* [1982] 1 MLJ 315 that there is no inherent right of appeal to the Federal Court C from the decision of an election judge.

Earlier still in 1967, an election judge had struck out the petition on the ground that it had not been served in accordance with the rules and considering that the order was interlocutory, he had given leave to appeal under s 68(2) of the Courts of Judicature Act 1964 (hereinafter 'the CJA'). D The Federal Court had set aside his decision but gave leave to appeal to the Privy Council. The Privy Council had held in *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261 that if the election judge made a final order it was unappealable, but upon the footing that his order was interlocutory, it was open to the election judge to give leave to appeal and the Federal Court to E entertain it. They further held that while the Privy Council would not entertain an appeal after the final determination of an election petition, the Federal Court — in giving leave to appeal under s 74 of the Act — had conferred upon the Privy Council jurisdiction to entertain the interlocutory appeal.

F Quite correctly, therefore, learned counsel for the appellant had conceded the point that there is no appeal from the decision of an election judge. Thus, the necessity for the originating motion for leave to apply for certiorari. Before us, he had referred to *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228, where the appellants had applied to the High Court for leave to apply for G an order of certiorari to quash an award of the Industrial Court and for leave to apply for an order of mandamus against the Industrial Court. The applications were dismissed in the High Court. The appellants appealed. The Supreme Court held that the guiding principles ought to be that the appellants must show prima facie that the application is not frivolous or H vexatious and that there is some substance in the grounds supporting the application. On the evidence in that case, they were of the view that the appellants had prima facie an arguable case for the grant of the relief they sought. In my view, this case is not exactly on point as here we are dealing with the decision of an election judge and not of the Industrial Court.

I As for the leave for certiorari, a similar application had in fact been made — incidentally before the same trial judge as in this case — in *Ignatius Stephen Malanjum v Election Judge, Sabah & Anor* [1989] 2 MLJ

433, who had decided that the election judge sits in the High Court supervising his powers relating to election petitions in accordance with the election law, which is a special law; and he exercises his powers in the same jurisdiction and holds coordinate jurisdiction. Therefore, he added, the court in which the election judge sits is not an inferior court against which an order of certiorari or prohibition can be issued.

It is essential for our purpose to reproduce the oral judgment of the Supreme Court in that same matter on appeal as it is not reported. The judgment is as follows:

IN THE SUPREME COURT OF MALAYSIA HOLDEN AT KOTA KINABALU

(APPELLATE JURISDICTION)

SUPREME COURT CIVIL APPEAL NO 03–42–89

BETWEEN

IGNATIUS STEPHEN MALANJUM ... APPELLANT

AND

ELECTION JUDGE SABAH & ANOR ... RESPONDENT

CORAM: LEE HUN HOE CJ (BORNEO)
HARUN M HASIM SCJ
MOHD YUSOFF MOHD SCJ

ORAL JUDGMENT

On 30 June 1988 Chong Siew Fai J, sitting as an election judge, held that in the absence of any express provision an election petition had not abated by reason of the fact that the state legislative assembly had been dissolved. Therefore, he considered that he had jurisdiction to hear the election petition. Against the decision, the appellant appealed but subsequently withdrew the appeal. He then applied for leave to issue an order of certiorari.

Many authorities were cited. Some are not binding but persuasive. It is not necessary to go into all these authorities. *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Products Manufacturing Employees Union & Ors* [1981] AC 36 was relied on to show that, despite the ouster clause, certiorari would lie if the tribunal was in excess of jurisdiction.

Section 33(1) of the Act provides that every election petition shall be tried by the Chief Justice or by a judge or the High Court nominated by the Chief Justice for the purpose. The scheme of the Act seems to be that an election petition must be tried by an election judge but collateral matters can be dealt with by an election judge or a High Court judge as a matter of expediency or convenience. There is no doubt that when an election judge makes a decision in an election petition, his decision is final.

In order to decide whether leave for the issuance of the prerogative orders of certiorari or prohibition sought to be given Mohamad Nor J, had to answer the question whether the court in which the election judge sits is an inferior court or not. To do so, he has to have regard to the Federal Constitution and the election legislation.

There is no election court as such. What happens is that the election judge sits in the High Court to hear the election petition. He constitutes a special tribunal. In view of the peculiar nature of the jurisdiction of the tribunal and the importance of the public interest of securing at an early date a final determination of an election petition, the legislature has clearly created the special tribunal where the ordinary incident of appeal does not apply.

With respect, having regard to the relevant provisions of the election legislation and authorities cited, we agree with the learned judge that the court in which the election judge sits is not an inferior court against which an order of certiorari or prohibition could be issued.

Accordingly, we would dismiss the appeal with costs both here and in the court below. Deposit to respondents to account of taxed costs.

Further reasons will be given later, if necessary.

–(Sgd)–
TAN SRI DATUK AMAR LEE HUN HOE
Chief Justice (Borneo)

This judgment, despite its brevity, seems to have answered the question and we are bound by it. There is therefore no judicial review of the decision of an election judge who, for all intents and purposes, has coordinate jurisdiction with — and not inferior jurisdiction to — a High Court judge.

Probably conscious of the fact that he did not have a ghost of a chance with the certiorari point — both before the learned trial judge and before us — learned counsel for the appellant had concentrated his submissions on s 84 of the Act instead to the point that the learned senior federal counsel before us had formed the opinion that learned counsel for the appellant had in fact abandoned the application for leave for certiorari and was just proceeding on the reference point.

According to learned counsel for the appellant, the learned trial judge was wrong in not referring the matter to the Federal Court under s 84 of the Act as regards the effect of art 118 of the Federal Constitution on the question 'whether the provisions of art 118 of the Federal Constitution preclude certiorari from going to quash the decision of an election judge'. He said the framers of the Federal Constitution must have had something in mind in including art 118 as it is a finality clause.

Sub-section (1) of s 84 of the CJA provides that: A

> Where in any proceedings in the High Court a question arises as to the effect of any provision of the Federal Constitution the judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.

Read in its proper context, 'the effect of any provision', in my view, must B surely mean a constitutional provision that has left room for doubt in the sense that it is vague or ambiguous which necessitates a proper construction of its interpretation from the Federal Court.

Article 118 of the Federal Constitution states that no election to the House of Representatives or to the legislative assembly of a state shall be C called in question except by an election petition presented to the High Court having jurisdiction where the election was held. Learned counsel for the appellant questioned the effect of that article. Is certiorari included or does it imply that a citizen could go no further than an election petition? That is the question the appellant wants to raise in the Federal Court. D

What is at stake, he added, is the appellant's right to represent the people in the Parliamentary constituency of Bukit Bintang, and not the first respondent who was appointed not by the electorate but by the election judge. The power given to the election judge appears to be too wide, he added, and this country cannot have Members of Parliament E being appointed by an election judge.

He had cited a passage from *Zulkarnaini bin Mohamed Noor v Syed Omar bin Mohamed & Anor* [1979] 2 MLJ 143, where the election judge had observed that:

> The other point is that the decision of election judges is not appealable. I do F not think election judges do not make mistakes whereas other judges do. We are all not infallible. What then happens if an election judge commits an error? An election judge has powers to unseat a Prime Minister in an election petition. It appears to me the aggrieved party has no remedies under the law. Perhaps this matter can be also considered so as to safegurad against errors made. Perhaps a quick reference after judgment to the Federal Court within a short period of time to be provided in the law is the answer. G

Learned counsel stressed that there was merit in the application as in fact there is another election petition which had asked for an order to declare the whole general election void. What if the election judge had agreed, he inquired.

He questioned the fact as to whether contempt of court is a criminal H matter as art 48(1)(e) of the Federal Constitution uses the word 'convicted' but no conviction had ever been recorded in all the earlier matters involving the appellant. In fact, the election judge had only deemed the offence as a criminal matter. At best, he said, it was a civil matter and art 48(1)(e) of the Federal Constitution does not apply. For these reasons, he argued, the I matter should have been referred to the Federal Court by the trial judge under s 84 of the Act.

A It is my finding, however, that art 118 of the Federal Constitution is crystal clear and the learned trial judge was correct in not acceding to the request of learned counsel for the appellant. An election can only be called in question by an election petition which in this instance had taken place. So whatever the decision of the election judge, including his finding on the interpretation of art 48(1)(e) of the Federal Constitution, rightly or wrongly, B that decision stands.

I have since read the judgment in draft of my learned sister, Siti Norma Yaakob JCA, and fully agree with it. For the reasons stated above, it is also my opinion that the decision of the learned trial judge does not warrant any interference from us, and the appeal is accordingly dismissed C with costs and the deposit paid to the respondents to account of their taxes costs.

Abu Mansor JCA: I would like to put in a few words of concurring judgment. I agree with the decision of my learned sister, Siti Norma D Yaakob JCA and the reasons therefore that this appeal, be dismissed since it is devoid of merits. I have also been shown the final judgment of my learned brother judge, Abdul Malek Ahmad JCA in agreement with her.

I need not have to narrate the facts of this appeal since that has been done elsewhere. Our task has been made somewhat easier by the appellant's E counsel on the day of argument reducing his five grounds originally to only two substantial grounds, namely that the learned judge below had erred in refusing to refer a constitutional question, ie art 118 of the Federal Constitution for the consideration of the Federal Court; and secondly, that his client should have been given leave to issue a writ of certiorari reviewing the decision of the learned election judge of 2 August 1995 F declaring that he was not the winner of the election to the Parliamentary Constituency of Bukit Bintang held on 25 April 1995 since he was a disqualified person, convicted and fined RM7,000 by 14 April 1995.

On the first ground whether the learned judge was wrong in not having referred to the Federal Court for the interpretation of art 118 of the G Federal Constitution, I agree that there is no merit in the contention that the learned judge had erred. It is settled law that a reference is only done if a question arises in the course of the proceedings before him and there is ambiguity and it would help to advance the rapid conclusion of that proceeding. Article 118 of the Federal Constitution says:

H 118 Method of challenging election

> No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

I In my view, the article cannot be more clear that it needed the interpretation of the Federal Court. The learned judge, I am sure, would have posed to himself the question: was it a question that had arisen for his determination

and whether by referring it would have assisted him in the early conclusion of the proceedings before him which was in actual fact an application for leave under O 53 Rules of the High Court 1980 to challenge the decision of an election judge? Shorn of all its ramifications the appellant's application, in substance, if allowed, was really an attempt whose prime object was to challenge and to upset the decision of the election judge which Parliament, in its wisdom by ss 34–36 of the Election Offences Act 1954, has provided a mode of challenging by an election petition. It has been argued by the appellant, rather forcefully, that an election judge could err in his decision and can even bring down the whole government, by declaring the whole election void. My answer is it is not for us to question to wisdom of Parliament. What we can say is the task of hearing any election petition has been given by Parliament to a Court of Chief Justice and anyone nominated by him. Parliament has, by s 36 thereof, laid out that the judge's decision is final. I am of the firm view that with the above considerations, the answer the learned judge would have arrived was a refusal to refer and that, in my view, was correct.

With that, I come to the other ground of appeal raised by the appellant which was the issue of whether the decision of the election judge in this case is amenable to review by certiorari by another judge? The first principle of review has been settled and it must be review of a decision of an inferior tribunal over which the court has supervisory jurisdiction. Is the decision of the election judge such? I agree with the learned judge below that the decision of the (then) Supreme Court in *Ignatius Stephen Malanjum v Election Judge, Sabah & Anor* [1989] 2 MLJ 433, which judgment has been fully reproduced by my learned brother judge Abdul Malek Ahmad JCA, a decision by which we are bound, is a sufficient answer to the contention of learned counsel for the appellant that the election judge's decision is amenable to certiorari. It is not.

I join my learned sister, Siti Norma Yaacob JCA and my learned brother, Abdul Malek Ahmad JCA for reasons given by them and by me that the appeal be dismissed with costs.

Postscript

5 March 1996

Siti Norma Yaakob JCA: We had, on 29 February 1996, dismissed this appeal with costs to the respondents and also ordered that the deposit made by the appellant be paid out to the respondents to account of their taxed costs.

As the respondents did not participate in the proceedings, Stanley Issacs, senior federal counsel for the Attorney General, applied under O 20 r 11 of the Rules of the High Court 1980 to vary the order on costs in that they should be paid to the Attorney General instead. The justification for this is that the Attorney General has been heard in opposition to the application for leave after having been served with the necessary papers pursuant to O 53 r 1(3) of the Rules.

A Mr Karpal Singh, counsel for the appellant, had no objection to the application, and we had accordingly varied the order on costs to the extent that they be paid to the Attorney General and that the deposit made by the appellant be paid out to the Attorney General to account of his taxed costs. The same variation order is also to be reflected in the written judgments of Abu Mansor and Abdul Malek Ahmad JJCA.

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Order accordingly.

Reported by Isabel Liong

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